2015

Todd Wayne Mulder, Plaintiff/Appellant, vs. State of Utah, Defendant/Appellee

Utah Court of Appeals

Case No. 20140642–CA

IN THE

UTAH COURT OF APPEALS

TODD WAYNE MULDER,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from dismissal of petition for post-conviction relief, in the Fifth Judicial District, Washington County, the Honorable G. Rand Beacham presiding

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Oral argument not requested

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STATEMENT OF JURISDICTION

Todd Wayne Mulder appeals the denial of his petition for post-conviction relief, wherein he collaterally challenged his convictions for murder, aggravated robbery, and aggravated kidnapping. This Court has jurisdiction under Utah Code Annotated § 78A-3-102(3)(j) (West 2009).

INTRODUCTION

On November 24, 2003, Daniel Campbell walked into a coin store in St. George, shot the owner in the chest, bound him, and then stole coins and money from the store's safe. The owner later died from his wounds.

Months later, police learned that Todd Mulder helped plan the robbery, was Campbell's getaway driver, and shared in the robbery proceeds. A jury convicted Mulder of murder, aggravated robbery, and

aggravated kidnapping, and this Court affirmed those convictions on appeal.

Mulder then filed a post-conviction action collaterally challenging his convictions. The district court below denied all of Mulder's claims on summary judgment.

STATEMENT OF THE ISSUES

1. At trial, Campbell and another accomplice both testified about Mulder's role in the crimes. In his post-conviction petition, Mulder argued that he was entitled to relief based on newly discovered evidence—namely, an affidavit from Campbell in which Campbell claimed that Mulder had nothing to do with the crime. The district court granted summary judgment on this claim, reasoning that this was mere impeachment evidence and would not make it impossible for a reasonable jury to have convicted.

Was this ruling correct?

2. Mulder claimed that his appellate counsel was ineffective for not arguing that trial counsel should have requested a cautionary jury instruction about the accomplices' testimony. The district court granted summary judgment, reasoning that Mulder was not entitled to such an instruction under the governing statute.

Was this ruling correct?

had proffered no specific evidence about who those witnesses were or what they would have said.

Was this ruling correct?

7. Mulder claimed that his appellate counsel should have argued that trial counsel improperly prevented Mulder from presenting his preferred defense. The district court granted summary judgment on this because the record shows that trial counsel presented the very defense that Mulder requested.

Was this ruling correct?

Standard of Review: Review is for correctness. *See Honie v. State*, 2014 UT 19, ¶28, 342 P.3d 182.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following are reproduced in Addendum A:

- Utah Code Ann. § 78B-9-104 (West 2009);
- Utah Code Ann. § 78B-9-106 (West 2009).

3. Mulder claimed that his appellate counsel was ineffective for not arguing that the trial prosecutor knowingly presented false testimony. The district court granted summary judgment on this claim because Mulder had proffered no evidence showing that the testimony at issue was false or that the prosecutor knew of its alleged falsity.

Was this ruling correct?

4. Mulder claimed that his appellate counsel was ineffective for not arguing that Mulder's trial counsel should have asked prospective jurors about their religious affiliation. The district court granted summary judgment, reasoning that there was no legal basis for asking those questions in this case.

Was this ruling correct?

5. Mulder claimed that his appellate counsel was ineffective for not arguing that Mulder's trial counsel should have moved to strike four jurors. The district court granted summary judgment, reasoning that there was no basis for striking any of them.

Was this ruling correct?

6. Mulder claimed that his appellate counsel should have argued that trial counsel was ineffective for not subpoenaing additional alibi witnesses. The district court granted summary judgment on this claim because Mulder

STATEMENT OF THE CASE[1]

Underlying Crime

In the fall of 2003, Todd Mulder was living with his girlfriend Lori Schlegel. R253:115. At the time, Mulder was on parole after serving a lengthy prison sentence for armed robbery. R255:558-59.

Schlegel lived off a small monthly disability check. R253:115. She also made money helping Mulder commit burglaries. R253:115-16. This didn't amount to much, though, and Mulder and Schlegel still "needed money." R255:610. Schlegel and Mulder decided to sell a set of coins that Schlegel had obtained, so they took her coins to the Allgood Coin Shop in St. George and met with Jordan Allgood, the shop's owner. R253:118-19. After spending two days going through the coins, Allgood paid cash for the coins. R253:120, 122. While they were there, Schlegel noticed that Allgood had retrieved the cash from a safe behind his counter and had left the safe unlocked. R253:122.

In early November 2003, Mulder had a chance meeting with Daniel Campbell, whom he knew from a prison stint in Nevada. R253:171. At the time of this meeting, Campbell had recently absconded from a court-ordered halfway house and was on the run. R253:125-26, 173.

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[1] The State will cite to the record from the criminal case (case no. 051501050) as R___, and the record from the post-conviction case as PCR___.

Campbell began spending time at Schlegel and Mulder's apartment. R253:126-27, 384; 255:564. While Campbell was there one day, Schlegel mentioned the Allgood Coin Shop and said that Allgood was "sitting on a gold mine." R253:128.

Campbell and Mulder decided to rob the coin shop. Campbell suggested that he and Mulder enter the store together, but Mulder pointed out that Allgood would "know [him]" because he had been inside the store several times. R253:186. They agreed that Campbell would rob the store, while Mulder would act as the getaway driver. R253:186, 193.

The two obtained a wig and coat for Campbell to use as a disguise. R253:138. They also obtained walkie-talkies to communicate, as well as duct tape and handcuffs to restrain Allgood. R253:137, 200. Campbell wanted to carry a stun gun, R253:137, 182, but Mulder insisted that Campbell use a pistol that Mulder had recently obtained. R253:183, 196. Mulder also instructed Campbell to "be a lion" when he went inside—i.e., to "go in and be forceful, take control of the situation immediately." R253:202.

On November 24, 2003, Mulder, Campbell, and Schlegel drove to Mesquite, Nevada, in Schlegel's truck, and checked in together at a local hotel under Schlegel's name. R253:142-43. The next morning, Campbell put his disguise on in front of Mulder and Schlegel. R253:143. Mulder and

Campbell then drove to St. George. R253:144. Mulder dropped Campbell off a short distance from the coin store. R253:215.

Campbell entered the store and began "screaming and yelling." R253:217. Allgood was on the phone at the time. *Id.* When Allgood looked at Campbell "kind of funny," Campbell shot him once in the chest. R253:217-19. Campbell wanted to make sure that the wounded Allgood could not interfere with the robbery, so he handcuffed Allgood's hands behind his back. R253:220.

As expected, the safe was unlocked. *Id.* Campbell loaded two duffel bags full of coins and money, radioed Mulder that he was ready to be picked up, and left. R253:222-23. When Campbell got inside the truck, he told Mulder that he had shot Allgood in the shoulder. R253:224. Mulder told him not to call 911. R253:225. Allgood died a short time later. R263:33.

Mulder drove Campbell back to the hotel room and then divided the coins and money. R253:248-49. As part of their share, Mulder and Schlegel received two cougarans, which are one-ounce gold coins, as well as "lots of silver coins." R253:148, 150.

Two days after the robbery and murder, Mulder and Schlegel went to a pawn shop in Las Vegas to sell one of the cougarans. R253:154, 253; 254:376. Campbell approached them unannounced in the parking lot and

told them that he had sold a cougaran at that same pawn shop earlier that day. R253:156, 253. Mulder was concerned that this would attract attention. R253:156. He offered Campbell $3000 for the coins that Campbell still had from the robbery. R253:158, 255. Mulder told Campbell to "take the $3000 and get out of here. We don't want to ever know who you are, we don't want to see you again." R253:158. Mulder also said: "Man, you need to watch your back and you need to keep your mouth shut." *Id.*

In the months following this crime, Campbell and Mulder were both reincarcerated on different offenses, but officers had not linked them to the Allgood murder. R. 263: 53-55, 68, 74-75. In October 2004, officers received a tip that Campbell had confessed his involvement in this crime to a fellow inmate and that Campbell had also implicated a former cellmate named "Todd" and "Todd's" girlfriend. R263:55-62.

Officers followed up on this lead and were ultimately led to Todd Mulder, Campbell, and Schlegel. During subsequent interviews, Campbell and Schlegel both admitted their involvement in the crime, and both of them claimed that Mulder was involved in its planning and execution; when interviewed in jail, however, Mulder denied that he was involved. R253:164-66, 266; 263:72-73, 75.

Trial

Mulder was charged with murder, aggravated robbery, and aggravated kidnapping. R1-3.

At trial, Schlegel and Campbell both testified and implicated Mulder in the crime. The State also introduced a video of the shooting taken from the coin shop's security camera. R263:37-38. It showed Campbell approaching the store's door after the shooting and "motioning out to someone" outside. R263:50. In addition, the State presented evidence showing that Schlegel had paid for a room in Mesquite the night before the crime, as well as a receipt showing that Mulder had sold a gold coin at a Las Vegas pawn shop two days after the homicide. R254:376.

Mulder also agreed to a stipulated set of facts that acknowledged Campbell's role in the robbery and shooting, Campbell's prior relationship with Mulder from prison, and that Mulder and Schlegel had purchased Campbell's remaining coins after the shooting. R174-76.

Mulder testified in his own behalf. In his testimony, Mulder acknowledged having been in Allgood's shop several times with Schlegel, as well as hearing Schlegel refer to it as a "gold mine." R255:556-61. He also acknowledged having met up with Campbell a few weeks before the

robbery, as well as being with Schlegel and Campbell when the idea of robbing the Allgood store came up. R255:565.

Mulder claimed, however, that it was Schlegel's idea to rob the store and that she had blackmailed him into participating in the planning. R255:572, 621. He acknowledged that he helped Campbell obtain the disguise and that he watched Campbell don it that morning, but he claimed that he did so only because of Schlegel's blackmail. *Id.*

Mulder denied doing anything else with respect to the robbery or shooting. According to Mulder, Campbell drove off alone to rob the coin shop, while he spent the morning attempting to sell stolen jewelry in Mesquite. R255:573, 581, 583-94, 610. Mulder claimed that when Campbell returned, Campbell and Schlegel divided the stolen coins together without his participation. R255:599. On cross-examination, however, Mulder admitted that he received some of the resulting proceeds through Schlegel, that he pawned a gold coin two days after the robbery, and that he purchased Campbell's remaining coins. R255:605, 631-32.

The jury convicted Mulder on all counts. R213-16.

Direct appeal

Mulder's appellate counsel raised two claims on direct appeal: first, that trial counsel should have argued that the aggravated kidnapping

merged into the aggravated robbery; and second, that trial counsel should have moved to dismiss the aggravated kidnapping charge for insufficient evidence. *State v. Mulder*, 2009 UT App 318 at *1 (unpublished). This Court rejected both claims. *Id.* at *1-3.

Post-Conviction

On August 25, 2010, Mulder filed a petition for post-conviction relief. Mulder raised 29 claims, most of which alleged that his trial counsel was ineffective. *See generally* PCR29-121. He also alleged that his appellate counsel was ineffective for not raising those claims on appeal. PCR119. In addition, Mulder alleged that he was entitled to relief based on newly discovered evidence. In support, he proffered an affidavit from Campbell in which Campbell recanted some of his trial testimony. PCR78-91.

The district court directed the State to only respond to the appellate ineffective assistance and newly discovered evidence claims. PCR170-71, 290-91. The State moved for summary judgment on all claims. The later court granted the State's motion. PCR561-70 (Addendum B). In its written ruling, the court noted that because it was "persuaded almost entirely" by the State's arguments, it would "not indulge in much analysis of the issues." PCR561-62. The court instead "provide[d] only" a brief "summary of the issues" and the basis for its rulings. PCR562.

Mulder appeals the denial of his petition.

SUMMARY OF ARGUMENT

Point I: Mulder sought relief under the PCRA's newly discovered evidence provision. He relied on an affidavit from Daniel Campbell in which Campbell recanted his trial testimony, now claiming that Mulder had nothing to do with this crime.

The district court correctly ruled that the proffered testimony failed as a matter of law to support post-conviction relief based on newly discovered evidence. First, Campbell's recantation would be mere impeachment evidence that does not justify post-conviction relief. Second, a reasonable juror could still vote to convict Mulder, either by disregarding Campbell's recantation, or even by disregarding Campbell's testimony entirely and convicting based on Schlegel's testimony and the other evidence.

Point II: Mulder claims that his appellate counsel was ineffective for not arguing that trial counsel should have requested a cautionary instruction about the weight that should be given to the testimony of his accomplices.

The district court correctly concluded that the claim failed as a matter of law. The controlling statute requires such an instruction only when an individual accomplice's testimony is uncorroborated. That is not the case

here, where Campbell and Schlegel corroborated each other, and where their joint account at trial was partially corroborated by Mulder's own testimony and by other physical evidence.

Point III: Mulder claims that his appellate counsel should have argued that the prosecutor committed misconduct by presenting false testimony from Schlegel. Mulder relies on a change in Schlegel's testimony—namely, at the preliminary hearing, Schlegel said that she had not seen Mulder with a gun, but at trial, she said that she remembered seeing Mulder with a gun several weeks after this crime.

To prevail on this claim, however, Mulder must point to evidence in the record showing both that the evidence was false and that the prosecutor knew of its falsity. The record does not prove either of these things. Thus, there was no basis for appellate counsel to have raised this claims.

Point IV: Mulder claims that his appellate counsel was ineffective for not arguing that trial counsel should have asked jurors about their religious affiliation. But under controlling law, such questions would have been appropriate only if religion were "clearly relevant" to this case. It was not here, because the events in question did not take place in a church, implicate a church, and no witness or actor's religion was ever mentioned to the jury.

Mulder also argues that his appellate counsel should have argued that his trial counsel was somehow complicit in ensuring that non-Mormons were not seated on this jury. But nothing in the record supports this claim. To the contrary, the record shows that neither counsel nor the court were aware of jurors' religious affiliation, let alone involved in an effort to exclude members (or non-members) of any religion from the jury.

Point V: Mulder claims that his appellate counsel was ineffective for not arguing that trial counsel should have moved to strike four jurors for cause. But in each instance, the record shows that juror in question was not actually biased against Mulder. Because of this, Mulder has not shown that he was prejudiced.

Moreover, to overcome the presumption of effectiveness in this context, Mulder must prove that a juror's bias against him was so strong that his counsel could not have had any plausible countervailing subjective preference for keeping the juror. In this case, however, all of the jurors in question were competent to serve, and several gave answers in voir dire that were potentially favorable to Mulder's position. The district court therefore correctly concluded that Mulder did not carry his burden.

Point VI: Mulder claims that his appellate counsel was ineffective for not arguing that trial counsel should have subpoenaed additional alibi

witnesses. But nothing in the record identifies who the additional witnesses could have been or what they could have said to support Mulder's alibi. Thus, there was no basis for appellate counsel to have made this claim, nor is there any proof that Mulder was prejudiced by its absence.

Point VII: Finally, Mulder claims that his appellate counsel was ineffective for not arguing that trial counsel should have been removed based on an unwillingness to present Mulder's desired defense. But the trial record shows that Mulder was allowed to present the very defense he desired. Thus, there was no prejudicial error.

ARGUMENT

I.

The district court correctly granted summary judgment on the newly discovered evidence claim because Mulder's proffer presented mere impeachment evidence that was not enough to prevent a reasonable juror from convicting Mulder.

Mulder first argues that the district court erred in granting the State's request for summary judgment on his newly discovered evidence claim. Aplt. Br. 17-22.

Under the PCRA, a petitioner is entitled to relief if he presents newly discovered evidence that "is not merely impeachment evidence" and, "viewed with all the other evidence . . . demonstrates that no reasonable

trier of fact could have found the petitioner guilty" of the underlying offense. Utah Code Ann. § 78B-9-104(1)(e)(iii), (iv) (West 2009).

A district court must grant summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. Proc. 56(c). Summary judgment serves a "salutary purpose in our procedure because it eliminates the time, trouble and expense of a trial, when upon the best showing the plaintiff can possibly make, he would not be entitled to a judgment." *Brandt v. Springville Banking Co.*, 353 P.2d 460, 462 (Utah 1960). Summary judgment on behalf of the State in a post-conviction case is entirely appropriate. Rule 65C(k), Utah Rules of Civil Procedure, expressly contemplates it, and Utah appellate courts have repeatedly affirmed grants of summary judgment in such cases. *See, e.g., Archuleta v. Galetka*, 2011 UT 73, ¶49, 267 P.3d 232 ("courts rule on summary judgment motions in PCRA cases all the time").

A. Additional procedural background.

Mulder sought post-conviction relief based on newly discovered evidence. In support, he submitted an affidavit from Daniel Campbell in which Campbell attested that "Mulder was innocent of all charges" and that

he had previously "lied about [Mulder's] involvement." *Campbell Affidavit.*[2] Campbell also claimed that he had "trick[ed]" Mulder and Schlegel "into going to Mesquite, Nev. under false pretenses." *Id.* He claimed that on the day of the murder, he dropped Mulder off at a shopping complex, and that Campbell then "went to St. George and did the armed robbery . . . completely alone." *Id.*

The district court denied the claim. It first noted the possibility that this may have been impeachment evidence—and therefore incapable of satisfying the PCRA's newly discovered evidence standard. PCR564. But the court declined to rule on that basis. Instead, it held that, when "viewed with all the other evidence," Campbell's post-conviction proffer "certainly" would "not demonstrate that no reasonable trier of fact would find [Mulder] guilty." PCR565. The court noted that Campbell's affidavit contradicted both his trial testimony and Mulder's trial testimony. *See id.* The court also noted that Campbell's recantation "would have little credibility because Daniel Campbell would clearly be admitting that he lied under oath at Petitioner's first trial." *Id.* The court also noted that the jury

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[2] This affidavit was attached as one of the attachments to Mulder's petition, *see* PCR78, but the district court did not include Mulder's attachments in the appellate record. Mulder has also attached this affidavit as Attachment C to his brief. The State will cite to it as *Campbell Affidavit.*

would still have had Schlegel's testimony and physical evidence that implicated Mulder. *Id.*

B. The district court correctly granted summary judgment on this claim because Campbell's affidavit was mere impeachment evidence and would not make it so that no reasonable juror could convict.

1. This was mere impeachment evidence.

Although the district court declined to rule on whether this was mere impeachment evidence, this Court can—and should—affirm on this basis. *See Madsen v. Washington Mut. Bank, FSB*, 2008 UT 69, ¶26, 199 P.3d 898 ("When reviewing a decision made on one ground, we have the discretion to affirm the judgment on an alternative ground if it is apparent in the record." (emphasis omitted)).

Here, Campbell's post-conviction account merely contradicted a separate account. If he had somehow given it before trial, its only use would have been to impeach his trial testimony. As noted, however, the PCRA precludes relief where the newly discovered evidence is "merely impeachment evidence." Utah Code Ann. § 78B-9-104(1)(e)(iii). Because of this, Mulder was not entitled to relief and this Court may affirm on this alternative basis alone.

2. Mulder's proffer failed as a matter of law to establish that no reasonable juror could have convicted Mulder.

To succeed on this claim, Mulder also had to establish that if the newly discovered evidence is "viewed with all the other evidence," "no reasonable trier of fact could have found the petitioner guilty" of the offense. Utah Code Ann. § 78B-9-104(1)(e)(iv). There are several reasons why Campbell's affidavit falls far short of this.

First, a jury could choose to disbelieve it. As noted, Campbell's new account conflicts with the sworn testimony that he gave at trial. Thus, at most, this affidavit creates a credibility contest between Campbell (now) and Campbell (before). But a jury could rationally choose to believe Campbell's earlier account, rather than his new one, so this affidavit does satisfy the controlling standard.

Second, this affidavit also conflicts with the account Mulder gave at trial. As noted, Campbell now takes full responsibility for this crime. He asserts that he "lied about [Mulder]'s involvement in my crime" at trial and claims that he "trick[ed] Mulder" and Schlegel "into going to Mesquite, Nev. under false pretenses." *Campbell Affidavit.* Campbell thus claims that he "did it completely alone." *Id.*

But this is not what Mulder said at trial. At trial, Mulder testified that it was Schlegel, not Campbell, who was the mastermind and driving force

behind this crime. Mulder testified that it was Schlegel who first brought up the idea of robbing the coin shop. R255:565. Mulder testified that Schlegel blackmailed him into participating. R255:572-73. Mulder testified that Schlegel provided the money for obtaining a wig and fake beard. R255:576. Mulder testified that after Campbell returned from the robbery, Schlegel and Campbell divided the proceeds equally between them. R255:599. Mulder thus claimed that this crime "was her baby." R255:619.

Thus, if Campbell's recantation were introduced at a retrial, it would not necessarily exonerate Mulder. Rather, it could actually undermine Mulder's defense by contradicting his own sworn version of what happened.

Third, the jury could also still convict based on Lori Schlegel's testimony, wherein Schlegel testified that Mulder actively and voluntarily participated in the planning and execution of this crime. *See generally* R253:129-48.

Notably, other sources—including Mulder himself—corroborated much of Schlegel's account. For example, Schlegel testified that Mulder and Campbell obtained the disguise for Campbell to use in the robbery; Mulder acknowledged this. R255:610. Schlegel claimed that Mulder watched Campbell put on the disguise the morning of the murder; Mulder

acknowledged this. R255:611. Schlegel claimed that Mulder and Campbell left that morning in her truck; Mulder acknowledged this. R255:610-11. Schlegel claimed that when Mulder left, he told her that he was going to St. George to assist Campbell in the robbery; Mulder acknowledged this. R255:627-28. Finally, Schlegel claimed that, two days after the robbery, Mulder pawned off one of the stolen gold coins at a pawn shop; Mulder acknowledged this. R255:631.

Unlike Mulder and Campbell, Schlegel does not have a long history of convictions for crimes of dishonesty. Thus, Schlegel was likely the most credible of the three conspirators, and even with the Campbell affidavit, her testimony still remains largely corroborated. Because a jury could still reasonably choose to believe her, Campbell's recantation does not so alter the evidentiary picture that no reasonable jury could have convicted Mulder.

In his brief, Mulder nevertheless argues that under *Julian v. State*, 2002 UT 61, 52 P.3d 1168, a newly discovered evidence claim does not automatically fail when one witness recants, but another does not. Aplt. Br. 17-19.

But *Julian* analyzed this question under the standard that existed "under the post-conviction relief case law in effect *prior to the enactment of*

the PCRA." *Julian*, 2002 UT 61, ¶13 (emphasis added). Under that previous standard, a petitioner was entitled to relief if there was "a substantial likelihood of a different result on retrial." *Id.* at ¶21. *Julian* expressly recognized that this was a lesser standard than the PCRA's current "no reasonable trier of fact" standard. *Id.* at ¶17 (recognizing that under the prior standard, the evidence "need not rise to the level of insuring that no reasonable trier of fact could have found the petitioner guilty").

Under the current standard, however, a petitioner can obtain relief only if *no reasonable juror* could still convict. *See* Utah Code Ann. § 78B-9-104(1)(e)(iv). Here, a reasonable juror could choose to disregard Campbell's recantation and convict Mulder based on all the other evidence, including Schlegel's sworn testimony. The district court therefore correctly dismissed this claim under the governing standard.

In any event, even on its own terms, *Julian* does not compel a different result. In dicta, *Julian* suggested that if a trial witness later recants, that recantation might satisfy the old newly discovered standard if the recantation was able to "*negate* an essential element of the State's case" or be used for "some other non-impeachment purpose." *Julian*, 2002 UT 61, ¶20 (emphasis added).

If there is inculpatory evidence from other sources, however, one witness's recantation could not logically "negate" an essential element of the State's case. In such a circumstance, the recantation's value would thus be limited to impeaching the prior testimony. This is the case here, where Campbell's recantation would have been counteracted by Schlegel's own independent account, Mulder's admissions at trial that he was involved in multiple aspects of this crime, and the physical evidence linking him to the crime (such as the receipt showing that he pawned some of the coins stolen during the robbery). Thus, even under *Julian*, this was not enough, and the district court did not err in dismissing this claim.

II.

Appellate counsel could reasonably decide to not argue that trial counsel was ineffective for not asking for a cautionary instruction about the accomplices' testimony.

Mulder claimed below that his appellate counsel should have argued that trial counsel was ineffective for not requesting a cautionary jury instruction about testimony from Mulder's accomplices. PCR91-97. The district court denied this claim, concluding that (1) Mulder was not entitled to such an instruction, and (2) its omission did not prejudice him. PCR565-66. Mulder challenges both aspects of that ruling. Aplt. Br. 22-26.

A. To prevail, Mulder would have been required to prove ineffective assistance of both appellate and trial counsel.

The PCRA provides the "sole remedy for any person who challenges a conviction or sentence" following the conclusion of the direct appeal process. Utah Code Ann. § 78B-9-102 (West 2009). Under § 78B-9-106(1)(c), however, a petitioner is ineligible for relief on any claim that "could have been but was not raised at trial or on appeal." If a claim is barred under this provision, however, the petitioner may still be eligible for relief if he shows that "the failure to raise that ground was due to ineffective assistance of counsel." Utah Code Ann. § 78B-9-106(3).

Here, Mulder claims that he received ineffective assistance of appellate counsel when appellate counsel did not raise each trial counsel claim on direct appeal. *See Ross v. State*, 2012 UT 93, ¶25, 293 P.3d 345; *Gregg v. State*, 2012 UT 32, ¶18, 279 P.3d 396 (to "succeed on an ineffective assistance of counsel claim in a post-conviction petition for relief," a petitioner must "prove that he received ineffective assistance from *both* his trial counsel and his appellate counsel" (Emphasis added.)). To prove ineffective assistance from appellate counsel, Mulder was required to prove "that appellate counsel's representation fell below an objective standard of reasonable conduct and that the deficient performance prejudiced [him]." *Rhinehart v. State*, 2012 UT App 322, ¶10, 290 P.3d 921 (citation omitted).

To show deficient performance on the appellate counsel claim, Mulder had to prove more than just that counsel overlooked a meritorious claim, because appellate counsel has no constitutional obligation to raise every non-frivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-52. That rule applies even when appellate counsel have the luxury of "no time or page limits" because a "brief that raises every colorable issue runs the risk of burying good arguments." *Id.* at 753; *accord Butterfield v. Cook*, 817 P.2d 333, 336 (Utah App. 1991). Moreover, if a claim is meritless, appellate counsel has no obligation to include it. *See, e.g., State v. Bedell*, 2014 UT 1, ¶24 n.25, 322 P.3d 697.

To prove prejudice on this claim, Mulder was required to prove that there was a "reasonable probability that, but for his counsel's unreasonable failure . . ., he would have prevailed on his appeal." *Kell v. State*, 2008 UT 62, ¶25, 194 P.3d 913 (citation omitted). In other words, Mulder was required to show that the omitted claim "'would have likely resulted in reversal of his conviction.'" *Id.*

With respect to the underlying trial counsel claim, appellate counsel would have been required to prove both deficient performance and prejudice. To prove deficient performance, appellate counsel would have been required to identify specific acts or omissions that fell outside reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 687-88, 690 (1984). She would have had to overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689; *see also Burt v. Titlow*, 134 S.Ct. 10, 17 (2013). Appellate counsel would have had to meet the burden "on the basis of the law in effect at the time of trial." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993); *accord Menzies v. State*, 2014 UT 40, ¶76, 344 P.3d 581 ("Importantly, in assessing whether counsel's performance was deficient, we must look at the facts and law available to counsel at the time of the representation.").

To prove prejudice, appellate counsel would have had to prove that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He would have had to prove that the "likelihood of a different result" was "substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Moreover, proof of prejudice "cannot be a

speculative matter but must be a demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082; *accord State v. Bryant*, 2012 UT App 264, ¶23, 290 P.3d 33.

B. The district court correctly denied this claim, where Mulder was not entitled to the cautionary instruction at issue.

There are several reasons why the district court's ruling was correct.

First, appellate counsel properly omitted this claim because Mulder was not so clearly entitled to an instruction that appellate counsel could have shown that all objectively reasonable trial counsel would have asked for it. Utah Code Annotated § 77-17-7 (West 2004) states:

> (1) A conviction may be had on the uncorroborated testimony of an accomplice.
>
> (2) In the discretion of the court, an instruction to the jury may be given to the effect that such *uncorroborated* testimony should be viewed with caution, and such an instruction shall be given if the trial judge finds the testimony of *the accomplice* to be self contradictory, uncertain or improbable.

(Emphasis added).

Here, the accomplice testimony was corroborated. As an initial matter, there was testimony from two accomplices (Schlegel and Campbell), not just one. While both were accomplices, the statute refers to the testimony of "the accomplice" in the singular. The plain language

implication is that a cautionary instruction is not warranted if there is testimony from multiple accomplices.

Moreover, Mulder himself corroborated much of their testimony. Mulder admitted that he was in the Allgood coin shop several times with Schlegel before the crime, that he met with Campbell a few weeks before the robbery, and that he was with Schlegel and Campbell when the idea of robbing the store came up. R255:556-65. He admitted that he helped Campbell obtain a disguise for the robbery and that he was with Campbell as he donned his disguise that morning. R255:573, 581, 583-94, 610. Mulder admitted that he received some of the stolen coins after the robbery, pawned one of them two days after the robbery, and later purchased Campbell's remaining coins. R255:605, 631-32. The State also introduced corroborating physical evidence, such as receipts showing that Mulder had sold the gold coin. R254:377.

Moreover, the statute only requires a court to give an instruction if the judge "finds the testimony of the accomplice to be self contradictory, uncertain or improbable." Utah Code Ann. § 77-17-7. Neither accomplice's testimony met this standard. Therefore, even if Mulder's trial counsel had requested the instruction, the trial court still retained discretion not to give it.

Second, Mulder also has not shown that appellate counsel could have proven *Strickland* prejudice on the trial ineffective assistance claim. Utah courts have repeatedly held that denying an accomplice-testimony cautionary instruction did not prejudice a defendant, particularly where the court instructed the jury to evaluate the witnesses' credibility and the credibility concerns associated with the accomplice were discussed at trial. *See, e.g., State v. Neeley*, 748 P.2d 1091, 1096 (Utah 1988); *State v. Guzman*, 2004 UT App 211, ¶37, 95 P.3d 302; *State v. Kingston*, 2002 UT App 103, ¶20, 46 P.3d 761.

This was the case here. The court explicitly instructed the jury to consider any witness's "possible bias or possible interest in the result of the trial, and any possible motive the witness may have to testify in a particular way." R197. The court also instructed the jury to consider whether any witness had given "self-contradicting testimony or was contradicted by other evidence." *Id.*

Mulder's trial counsel then repeatedly highlighted the self-interest of both Schlegel and Campbell at trial. Counsel elicited testimony that Schlegel had received full immunity for her testimony and that Campbell was testifying pursuant to his own plea bargain as well. R253:90, 92, 108-09, 165; 254:354. Mulder's counsel also called one of Campbell's fellow inmates,

who testified that Campbell had told him that he was testifying pursuant to a deal, as well as an expert witness on prison culture who testified that it would have been unlikely that Campbell would have testified without a deal. R254:386, 428-29.

Given all this, a cautionary instruction "was simply not necessary to prompt the jury to question [the] veracity" of these two accomplices, because the testimony had already "alerted the jury to [their] possible motive[s] for testifying with less than total candor." *Guzman*, 2004 UT App 211, ¶37.

In short, on these undisputed facts, trial counsel could reasonably conclude that the instruction was unwarranted or unlikely to be given. Likewise, on this record, it is unlikely that its omission undermined confidence in the outcome. The district court therefore correctly denied this claim.

III.

Appellate counsel could reasonably decide not to argue that trial counsel was ineffective for not arguing that the prosecutor knowingly presented false testimony from Lori Schlegel.

At the preliminary hearing, Schlegel testified that she had never seen Mulder with a gun. R249:57-58. At trial, she initially repeated this, testifying that she had only seen Mulder with a stun gun, not the revolver

that was used in the Allgood shooting. R263:138. During further questioning, however, Schlegel said that she did recall helping Mulder dispose of a gun several weeks after the crime. R255:470, 490. Despite this change in testimony, Mulder's trial counsel did not argue to the judge that the prosecutor had committed misconduct by knowingly presenting false testimony. *See generally* R255:470-97.

In his post-conviction petition, Mulder argued that Schlegel's later testimony that she had seen Mulder with a gun was false; he further argued that appellate counsel was ineffective for not arguing that trial counsel should have alleged that the prosecutor committed misconduct by knowingly presenting this false testimony. PCR108-10. The district court denied this claim, concluding that because Mulder's claim was not "factually or legally correct," "it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal." PCR568.

That ruling was correct on several levels.

First, appellate counsel did not perform deficiently by omitting this claim, because the factual underpinnings for a prosecutorial misconduct claim would not have been "obvious from the trial record." *Kell*, 2008 UT 62, ¶42 (citation omitted). To prevail on a prosecutorial misconduct claim, appellate counsel would have been required to demonstrate that the

prosecutor was "aware that testimony [was] false" but presented it anyway. *Larsen v. Davis Cnty.*, 2014 UT App 74, ¶4 n.3, 324 P.3d 641; *accord State v. Gordon*, 886 P.2d 112, 115 (Utah App. 1994). Moreover, counsel would have been obligated to do so based on the "facts . . . available to counsel at the time of the representation." *Menzies*, 2014 UT 40, ¶76.

Here, Mulder has pointed to a contradiction in Schlegel's testimony. But "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991); *accord Knighton v. Mullin*, 293 F.3d 1165, 1174 (10th Cir. 2002); *see also United States v. Holladay*, 566 F.2d 1018, 1019 (5th Cir. 1978) ("Presentation of a witness who recants or contradicts his prior testimony is not to be confused with eliciting perjury."); *United States v. Bortnovsky*, 879 F.2d 30, 33 (2d Cir. 1989) (same). Thus, her contradiction, alone, would not have satisfied the standard.

Second, nothing in the record proves that the testimony Mulder challenged (Schlegel's later testimony that she saw Mulder handle a gun) was actually false. At trial, Campbell testified that Mulder gave him the gun that he used in the robbery. R253:183-85. Like Schlegel, Campbell testified that this gun was a six-shot revolver. R253:185; 255:490. Given

this, appellate counsel could reasonably have decided not to press a prosecutorial misconduct claim that would have required *proof* that this was false.

Third, even if Schlegel did testify falsely, nothing in the record suggests that the prosecutor knew this and yet presented her testimony anyway. *See Larsen*, 2014 UT App 74, ¶4 n.3. Because of this, this claim would not have been obvious from the record and appellate counsel had no obligation to raise it.

Finally, Mulder's proffer failed as a matter of law to prove prejudice. To prevail, appellate counsel would have been required to prove that the error was "substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *State v. Kohl*, 2000 UT 35, ¶22, 999 P.2d 7 (citation omitted).

Here, the question involved in this claim would have been whether Schlegel actually saw Mulder handle a gun. But as noted, there was also testimony from Campbell corroborating Schlegel's claim that Mulder had a gun. More importantly, there was also an array of evidence showing that Mulder was involved in the planning and execution of this robbery and murder. Given all of this, there is no reasonable likelihood that the jury would have acquitted Mulder if it had not heard Schlegel say that she saw

Mulder with a gun several weeks after this crime, and Mulder therefore has not proven that he was prejudiced by appellate counsel's decision to omit this claim. The district court therefore correctly denied this claim.

IV.

Appellate counsel could reasonably decide not to argue that trial counsel was ineffective for not (1) questioning prospective jurors about religion or (2) arguing that there was an unconstitutional exclusion of non-Mormons from the jury.

In his post-conviction petition, Mulder claimed that appellate counsel was ineffective for not arguing that (1) Mulder's trial attorneys should have asked the jury pool questions about their religion so that they could attempt to ferret out religious-based bias against Mulder, and (2) there was an unconstitutional exclusion of non-Mormons from the jury. PCR30-44. The district court rejected both claims, concluding that (1) "inquiry into religious belief" would not have been permissible because religion was not "clearly relevant" to this case, and (2) there was "no evidence of any unconstitutional exclusion of non-Mormons from the jury." PCR562.

A. Appellate counsel could reasonably decide not to argue that trial counsel should have asked jurors about religion.

Mulder first faults his appellate counsel for failing to argue that trial counsel was ineffective for not asking potential jurors about their religious affiliation. Aplt. Br. 37-42. Mulder claims that voir dire questions about their religious affiliation were warranted because, as a "non-LDS member,"

he was "part of a distinct minority group in Washington County" whose "lifestyle conflict[ed] with LDS doctrine." Aplt. Br. 38-39. Mulder also claims that LDS jurors would have been biased against him because the victim was an LDS bishop. *Id.*

But appellate counsel was not obligated to raise what would have been a futile claim about trial counsel's performance during voir dire. "Jury selection is more art than science," and there "are a multitude of inherently subjective factors typically constituting the sum and substance of an attorneys' judgments about prospective jurors." *State v. Litherland,* 2000 UT 76, ¶21, 12 P.3d 92. Because of this, a trial attorney's "decisions during jury selection legitimately may be based on little more than personal preference. Defense counsel acting on their own intuitions, or upon their clients' requests, clearly have the right to identify and prefer particular jurors without regard to any particular objective criterion or philosophy of jury selection." *Id.* at ¶23.

While Mulder may now believe that his trial counsel should have believed that members of the LDS Church were necessarily biased against him, his counsel was not required to share that particular philosophy of jury selection. The claim fails for this reason alone.

In addition, even if trial counsel had believed that LDS members would make bad jurors in this case, he most likely would have been precluded from getting into the jurors' religious affiliations because religion was not a relevant inquiry. Article I, section 4 of the Utah Constitution declares that no person shall be deemed "incompetent as a witness or juror on account of religious belief or the absence thereof." Utah courts have recognized that, in particular circumstances, religious beliefs might form "the basis for actual bias, prejudice, or impartiality" for a particular juror. *State v. Ball*, 685 P.2d 1055, 1057 (Utah 1984) (citation omitted). Because of this, "inquiry into potential jurors' religious affiliation may occasionally be permissible during voir dire" – but only when religion is "*clearly relevant*" to the case. *State v. Burke*, 2011 UT App 168, ¶74, 256 P.3d 1102 (emphasis added); *accord State v. Flores*, 2015 UT App 88, ¶¶13-21, 784 Utah Adv. Rep. 12. If the "possibility of actual bias stemming from religious beliefs" is not present in a case, "it is ordinarily inappropriate to inquire into venire members' religious beliefs during voir dire." *Depew v. Sullivan*, 2003 UT App 152, ¶13, 71 P.3d 601.

In *Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 758 P.2d 929, 931-34 (Utah App. 1988), for example, a party was allowed to ask about the jurors' religious affiliation

because the LDS Church was a party to the suit. In *Depew*, 2003 UT App 152, ¶¶14-34, the plaintiff was likewise allowed to ask questions about religion because the defendant was absent from trial serving an LDS mission.

But as recognized by the district court below, religion was not "clearly relevant" here. PCR562. As noted, Mulder's first claim is that religion was clearly relevant because his "lifestyle conflict[ed] with LDS doctrine." Aplt. Br. 38-39. Mulder provides little explanation for this in either his petition or his appellate brief. So far as the State can tell, Mulder appears to be arguing that his "lifestyle" made religion relevant because he is not LDS. PCR37. But no Utah decision has held that this, alone, makes religion "clearly relevant" to any case involving a non-Mormon. Thus, appellate counsel was not obligated to make this claim. *See Menzies*, 2014 UT 40, ¶76.

Alternatively, Mulder also seems to suggest that, because the jury would hear that he met Campbell in prison, this "lifestyle" would be at odds with the lifestyle of religious jurors. PCR37-42. But opposition to this kind of "lifestyle" is not unique to members of any particular church, or even to religious people at all. Atheists and agnostics would likely have similar objections, because crime threatens all law-abiding citizens alike.

Obeying the law is a civic virtue, not a religious one, and religion therefore was not "clearly relevant" to the case. *Burke*, 2011 UT App 168, ¶74.[3]

Mulder also claims that religion was relevant to this case because the victim, Jordan Allgood, was an LDS bishop. Aplt. Br. 37-38. But contrary to Mulder's claim, Allgood's religious position did not make religion clearly relevant to this case. Allgood was not killed while he was at church or while he was serving in some ecclesiastical capacity; rather, he was killed while he was working at his coin shop.

Nothing in the record shows that Allgood's status as a bishop was ever mentioned to the jury. The only reference in the record to Allgood's status as a bishop came during a *pretrial* hearing—well before jury selection began—in which defense counsel mentioned to the court that Allgood "was a Mormon bishop and well known in the community." R250:5. But in voir dire, each prospective juror was asked whether they knew Allgood. No one said that they did.

Despite this, Mulder insists that some juror must have known about Allgood's position, speculating that it is "common sense that in a small town, people in that town know each other or know of each other" and that

[3] If Mulder's argument on this were accepted, it would theoretically make religion relevant to *any* case involving a criminal, thereby allowing this proposed exception to completely swallow the rule.

some juror likely knew that Allgood was a bishop. Aplt. Br. 40. But again, all of these jurors stated on the record that they did not know Allgood. Mulder's claim to the contrary is entirely speculative, and it therefore cannot support a claim of ineffective assistance. *See Munguia*, 2011 UT 5, ¶30 (proof of prejudice "cannot be a speculative matter but must be a demonstrable reality").

In short, this record contains no reference to religion in front of the jury. Given this, religion was not clearly relevant to the case and Mulder's trial counsel had no basis for asking prospective jurors about it. The district court correctly denied this claim.

B. Appellate counsel had no basis for arguing that there was an unconstitutional exclusion of non-Mormons from the jury.

Mulder also claims that appellate counsel should have argued that his trial counsel was ineffective for not objecting to the alleged exclusion of non-Mormons from the jury. Aplt. Br. 14, 40-41. The district court rejected this, concluding that because there was "no evidence of any unconstitutional exclusion of non-Mormons from the jury," appellate counsel had no basis for raising this claim. PCR562.

The district court was correct. After all, as Mulder himself recognizes, prospective jurors were *not* asked about their religious affiliation. This is the very basis for the first part of Mulder's claim. But if prospective jurors

were not asked about their religion, then trial counsel and the trial court would not have known who was (and was not) Mormon. On this record, it therefore would not have been obvious to appellate counsel that there was any exclusion of non-Mormons from the jury, and appellate counsel therefore had no obligation to make what would have been an unsupported claim. *Kell*, 2008 UT 62, ¶42.

On appeal, Mulder nevertheless argues that he did provide the district court with some supporting evidence. He relies on a proffer he made that another local attorney sometimes uses a jury questionnaire that asks jurors questions about religious affiliation. Aplt. Br. 41. He extrapolates that, because the jury questionnaire that was used in his case included no religious-affiliation questions, his counsel may have been actively complicit in ensuring that non-Mormons were excluded from this jury. *Id.*

But this speculation failed as a matter of law to provide a factual basis for the claim—that non-Mormons were excluded. And again, because no prospective jurors were asked about religious affiliation, there would have been no way to prove that prospective jurors were excluded on this basis.

In any event, even if there had been evidence of such exclusion, Mulder has not proven that appellate counsel even could have successfully made this claim. Mulder's brief on this aspect of his claim is somewhat

unclear. So far as the State can tell, it appears that Mulder is claiming that the alleged exclusion of non-Mormons was done through the use (or non-use) of peremptory challenges, thereby bringing this under the auspices of *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). But the United States Supreme Court has never extended *Batson* to religion-based strikes, and there "is no clear consensus" among the states or federal circuits on whether *Batson* does extend to religion-based strikes. *United States v. DeJesus*, 347 F.3d 500, 509 n.7 (3d Cir. 2003); *see also United States v. Heron*, 721 F.3d 896, 902 (7th Cir. 2013) (recognizing that just one federal circuit and "a handful of state courts have extended *Batson* to strikes based on a juror's religious affiliation"). Utah's appellate courts have not yet ruled on this issue.

But to show ineffective assistance of appellate counsel, Mulder must point to the "the law in effect at the time of trial." *Dunn*, 850 P.2d at 1228. Because there was no controlling law extending *Batson* to religion at the time of trial, neither trial nor appellate counsel would have a settled basis for making this argument. This provides an additional reason why the appellate counsel claim fails.

V.

Appellate counsel could reasonably decide not to argue that trial counsel was ineffective for passing four jurors for cause.

Before trial, the parties submitted a stipulated 13-page proposed jury questionnaire. R101-114; *see also* R250:3. Given concerns about the pretrial publicity, as well as the victim's standing in the community, the trial court submitted the questionnaire to prospective jurors and then conducted an extensive, two-day voir dire before selecting the jury. R152-54; 261-62.

In his petition, Mulder claimed that appellate counsel should have challenged his trial counsel's decision to pass 11 jurors for cause. PCR51-75. The district court rejected each of these arguments, concluding that Mulder's "accusations" about the jurors did "not rise above the level of 'conspiracy theories,' speculation and reckless besmirching of individuals and an entire community." PCR562.

On appeal, Mulder challenges this ruling with respect to four of the challenged jurors: Lois Dainack, Kris Gubler, Shawna Holt, and Susan Decorsey. Aplt. Br. 29-37.

A. To prevail, Mulder was required to prove that there was no plausible reason for counsel's decision to not move to strike each juror, as well as that each juror was actually biased.

Under rule 18(e)(14), Utah Rules of Criminal Procedure, a juror must be stricken where the juror's "conduct, responses, state of mind or other

circumstances . . . reasonably lead the court to conclude the juror is not likely to act impartially."

Courts have interpreted this provision to require striking a juror who is actually biased—i.e., who has "strong and deep impressions which will close the mind against the testimony that will be offered," thus causing her to "combat" any contrary testimony and "resist its force." *State v. Ramos*, 882 P.2d 149, 152 (Utah App. 1994) (citation omitted). A juror must therefore be stricken when her opinions or biases are "so strong or unequivocal as to inevitably taint the trial process." *State v. King*, 2006 UT 3, ¶23, 131 P.3d 202 (citation omitted). But where the juror only has "light impressions" that would not "close the mind against testimony offered in opposition," the juror need not be removed for cause. *State v. Gray*, 851 P.2d 1217, 1222 (Utah App. 1993); *accord State v. Cobb*, 774 P.2d 1123, 1127 (Utah 1989).

As discussed, in any ineffective assistance claim, trial counsel's performance is only deficient if a defendant identifies specific acts or omissions that could not constitute reasonable professional judgment. *Strickland*, 466 U.S. at 687-88, 690. When reviewing such a claim, an appellate court "indulge[s] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). If any "conceivable" tactical basis for trial counsel's actions exists, the claim fails. *State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162.

In *Litherland*, the Utah Supreme Court applied this to a claim that was based on counsel's failure to object to a particular juror. 2000 UT 76, ¶20. The court recognized two "distinct presumptions" that apply to such cases. "First, trial counsel's lack of objection to, or failure to remove, a particular juror is presumed to be the product of a conscious choice or preference. This follows from the general presumptions imposed by *Strickland* and from the fact that a conscious refusal to object to or remove a particular juror may be manifested by nothing more than silence in many circumstances." *Id.* "Second, because the process of jury selection is a highly subjective, judgmental, and intuitive process, trial counsel's presumably conscious and strategic choice to refrain from removing a particular juror is further presumed to constitute effective representation." *Id.*

"Consequently, because *Strickland* requires the presumption that trial counsel's strategic decisions are reasonable, and because trial counsel is justified in relying on little more than subjective preference for retaining a particular juror, it follows that the decision not to remove a particular juror

need only be plausibly justifiable, and such plausible justifiability is ordinarily presumed." *Id.* at ¶25.

A petitioner may overcome the double presumption only by proving: "(1) that defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of conscious choice or preference;" "(2) that a prospective juror expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror;" or "(3) that there is some other specific evidence clearly demonstrating that counsel's choice was not plausibly justifiable." *Id.*; *accord Taylor v. State*, 2007 UT 12, ¶¶74-75, 156 P.3d 739.

In addition to proving deficient performance, Mulder was also required to show that he was prejudiced by his counsel's alleged deficient performance. To do show ineffective-assistance based prejudice in the juror selection context, a petitioner must show that an actually biased juror sat on the jury. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000); *State v. King*, 2008 UT 54, ¶39, 190 P.3d 1283; *State v. Arriaga*, 2012 UT App 295, ¶13, 288 P.3d 588.

As with any other kind of ineffective assistance claim, a petitioner must prove both deficient performance and prejudice. Because of this, if it

is "easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," this Court may do so "without analyzing whether counsel's performance was professional unreasonable." *Archuleta*, 2011 UT 73, ¶41 (citation omitted).

B. Mulder did not carry his burden with respect to Lois Dainack.

Mulder first challenges trial counsel's decision not to challenge Lois Dainack for cause. Aplt. Br. 29-32. Mulder argues that Dainack should have been stricken because (1) she had worked as a prison nurse; (2) "she had once been the victim of a similar crime"; (3) a statement she made in her jury questionnaire suggested that she found police officers to be more credible; and (4) "a statement that she made regarding her husband who was once a N.Y. police officer" suggested that she was sympathetic to law enforcement. Aplt. Br. 29.

1. Mulder did not prove that Dainack was actually biased.

As noted, Mulder was required to prove both deficient performance and prejudice. Mulder did not prove prejudice because none of the grounds he identified demonstrated that Dainack was actually biased.

Dainack's past employment as a prison nurse: In her jury questionnaire, Lois Dainack stated that she had previously worked as a prison nurse. *See* PCR444. Both the prosecutor and defense counsel initially

agreed that she should be stricken for cause on this basis. R262:156. But after extensive questioning in chambers, both passed her for cause. R262:165-66, 179.

Contrary to Mulder's claim, her past employment does not show that she was actually biased. To the contrary, the Utah Supreme Court and the Utah Court of Appeals have both "upheld denials of motions to strike law enforcement personnel for cause when questioning on voir dire dispels any suggestion of bias raised by the prospective juror's law enforcement background." *Ramos*, 882 P.2d at 152; *see also Cobb*, 774 P.2d at 1127; *Coggeshell v. State*, 2011 UT App 375, ¶6, 265 P.3d 818 ("law enforcement personnel are not automatically disqualified from jury duty in a criminal case").

In *Ramos*, for example, the court of appeals concluded that a juror was not biased even though the juror had worked as a police dispatcher for 20 years. 882 P.2d at 152. In *Gray*, the court of appeals similarly passed a juror who had worked as a highway patrolman for four years. 851 P.2d at 1223. And in *Cobb*, the supreme court passed a juror who had worked as a police

officer with two different departments over the space of 2 years. 774 P.2d at 1127.[4]

This occurred here. During voir dire, Dainack explained that she had worked for 6 years as a prison nurse in the maximum security prison in New York. R262:157. She then repeatedly stated that this experience would not prejudice her in either direction when evaluating this case. R262:159-60. Dainack explained: "I think that every person has a right to being heard [on] all sides of whatever crime has been committed, and then a judgment made from that." R262:160. She further explained that as a medical professional in a prison, she had an obligation to treat all prisoners fairly, and that she had "tried not to become personal and take—make personal opinions over . . . these inmates that came into our unit." R262:160.

After Dainack left the court's chambers, defense counsel stated that after observing her and hearing her answers on the subject, he believed that she had been honest and had "an open mind." R262:165. The trial court agreed, stating that Dainack appeared "quite professional" and seemed "very even handed." R262:166-67.

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[4] Mulder nevertheless points to several Colorado decisions that apparently require automatic exclusion of prior law enforcement personnel. Aplt. Br. 30. But as the above-cited cases demonstrate, this is not the rule in Utah.

Given this, Dainack's past service working in a prison—as a nurse, not a corrections officer—provided no basis for determining that she was actually biased.

Dainack's past crime victimization: Mulder raised and argued this claim below, but his briefing on appeal is limited to a single sentence. *See* Aplt. Br. 29. In his brief, he provides no record support for the claim, nor does he offer any legal analysis of it. It is therefore inadequately briefed and should not be considered. *See* Utah R. App. P. 24(a)(9).

In any event, if reached, it fails. A "potential juror's prior victimization does not mandate the juror be removed for cause." *State v. Boyatt*, 854 P.2d 550, 553 (Utah App. 1993); *accord State v. Tennyson*, 850 P.2d 461, 469 (Utah App. 1993) ("We are unaware of . . . any rule that automatically disqualifies prospective jurors who have been, or have friends or relatives who have been, victims of crimes similar to those at issue in the case where they might sit as jurors.").

While such an experience might raise an inference of bias, the inference can be rebutted. "This is generally accomplished by the trial court simply asking if the juror can be impartial." *State v. Brooks*, 868 P.2d 818, 823 (Utah App. 1994). "If, after probing the prospective juror's state of mind, the trial court is satisfied that the juror can view and weigh the evidence

impartially, the inquiry is at an end." *Id.* Utah courts have therefore repeatedly upheld trial court decisions that a juror who had been victimized in similar crime was still impartial. *See, e.g., Wach,* 2001 UT 35, ¶¶28-31; *Brooks,* 868 P.2d at 823; *Boyatt,* 854 P.2d at 553; *Tennyson,* 850 P.2d at 469;

Here, when Dainack was questioned about this in chambers, she explained that she had been burglarized 18-20 years earlier in Nevada. R262:161. She said that she felt "a little violated" at the time, but that she could evaluate this case fairly despite that experience. R262:161-63. Dainack explained that she had not only had time to "get over [it]," but also that she had a "brother who went to prison for burglary." R262:163. Dainack said: "I love my brother," and accordingly stressed that she would have to "know [the] circumstances" before judging someone else who allegedly committed such a crime. *Id.* Thus, regardless of whether her own experiences created an inference of bias, Dainack was sufficiently rehabilitated.

Dainack's statement about police officers: In the written jury questionnaire, jurors were asked: "Do you agree/disagree with the following statement: 'A police officer's testimony in court should receive more or less weight, be given more or less credibility, than the testimony of

a non-police officer.'" PCR444. In response, Dainack wrote: "More credible—He holds a position of authority, should be honest." *Id.*

Mulder claims that this demonstrated that Dainack was actually biased. Aplt. Br. 30-31. But again, the question is whether her alleged bias was "so strong or unequivocal as to inevitably taint the trial process," *King*, 2006 UT 3, ¶23, i.e., whether her opinions would "close the mind against testimony offered in opposition." *Gray*, 851 P.2d at 1222.

In her written questionnaire, however, Dainack stated that she thought she "would be a good juror because [she] would not make a decision until" she had "heard all the facts." PCR446. She expressly agreed with the statement that because "[o]ne of the basic principles of American law is that a person cannot be convicted unless the prosecution proves the charges beyond a reasonable doubt," Mulder "is considered not guilty as he sits here," and she did not need to "hear anything to find him not guilty." PCR447.

Then, during voir dire, Dainack's individual questioning and counsel's on-the-record discussion about her was extensive—it spanned 23 pages of transcript. *See* R262:156-79. During that discussion, defense counsel heard Dainack state that, because of her experiences working in prison, she firmly believed that "every person has a right to being heard all

sides of whatever crime has been committed and then a judgment made from that." R262:160. Counsel also heard her stress that her brother had committed a burglary, that she loved him, and that that influenced her perspective on judging someone. R262:163.

At the conclusion of this discussion, defense counsel remarked on the record that he thought she was honest and had "an open mind." R262:165. The court agreed, stating that she seemed "quite professional" and "very even handed." R262:167.

Given this, Mulder has not demonstrated that this isolated answer from the jury questionnaire proved that Dainack was actually biased.

Dainack's comment about her husband: During questioning, Dainack was asked whether her deceased husband had worked for law enforcement. R262:171. She explained that he had been a traffic patrol officer in New York, but that he had left that job almost thirty years previously. R262:172. When defense counsel joked that her husband had been a "smoky bear on the turnpike," Dainack responded: "Yeah. One of New York's finest." *Id.*

Based on this exchange, Mulder argues that appellate counsel should have argued that trial counsel should have moved to strike her for cause. But contrary to Mulder's assertion, the term "New York's finest" does not

appear to have been Dainack's unqualified value judgment about all law enforcement; rather, it is more correctly understood as a reference to the common nickname for New York police officers. *See, e.g.* http://en.wikipedia.org/wiki/New_York_City_Police_Department (last visited June 3, 2015) ("Members of the NYPD are frequently referred to by politicians, some media, and their own police cars by the nickname *New York's Finest.*"). In any event, even if this offhand comment somehow created an inference of bias, Dainack was rehabilitated. When the court asked Dainack a follow up question about her husband, she stated that "there was nothing about being married to him" that would impact her thinking about this case. R262:172. This isolated comment provides no basis for concluding that Dainack was actually biased.

2. Mulder also has not demonstrated that his counsel had no plausible reason for wanting to keep Dainack on this jury.

As noted, Mulder must also prove deficient performance. In this context, he must overcome *Litherland*'s double presumption, which requires him to demonstrate, in part, that counsel could not have had any "plausible countervailing subjective preference" for retaining her. *Litherland*, 2000 UT 76, ¶25.

Mulder has not done this. As discussed above, Dainack was thoroughly vetted during voir dire, during which Dainack reaffirmed her

ability to judge fairly and even gave specific reasons for doing so—including her positive experiences working with inmates, as well her love for a brother who had run afoul of the law. *See* R262:160-63. Defense counsel was an active participant in that voir dire and had the opportunity to observe Dainack firsthand. Mulder therefore did not show that there was no plausible basis for the decision not to challenge her, and the district court therefore correctly dismissed this claim on this basis as well.[5]

C. Mulder did not carry his burden with respect to Kris Gubler.

Defense counsel passed Kris Gubler for cause and Gubler ultimately sat on the jury. R261:162. Mulder now claims that appellate counsel should have argued that trial counsel was ineffective for not moving to strike Gubler because: (1) Gubler was an LDS bishop, (2) Gubler was once a military police officer, and also had relatives who are officers. Aplt. Br. 33-

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[5] In passing, Mulder also claims that under *Litherland*'s second prong, his counsel was "so inattentive or indifferent during the jury selection process" regarding Dainack "that the failure to remove a prospective juror was not the product of conscious choice or preference." Aplt. Br. 31-32; *see also Litherland*, 2000 UT 76, ¶25. But such a claim is "defeat[ed]" where the transcript shows that trial counsel questioned prospective jurors during voir dire. *Taylor*, 2007 UT 12, ¶84. Here, Mulder's trial counsel was actively engaged throughout the voir dire process. Mulder's attorneys propounded a 12-page jury questionnaire to all prospective jurors in advance of trial, and both of his attorneys actively participated in the questioning of the prospective individual jurors throughout the two days of voir dire. *See* R261-62. This included the discussion about Dainack. *See* R262:156-79.

35. Mulder also claimed that he is entitled to relief because the transcript of Gubler's individual voir dire is incomplete. *Id.*

1. Mulder did not prove that Gubler was actually biased.

Gubler's status as a bishop: As noted above, religion was not an issue in this case, and nothing in this record demonstrates that it actually impacted Gubler's ability to fairly evaluate Mulder's guilt or innocence.

Mulder has not shown otherwise. Instead, he merely speculates that Gubler might have known Allgood because both were LDS bishops. But he points to nothing in the record which supports this. There was accordingly no evidentiary basis to establish that Gubler was actually biased against Mulder because of his ecclesiastical position. *See Munguia*, 2011 UT 5, ¶30 (proof of prejudice "cannot be a speculative matter but must be a demonstrable reality").

Gubler's connections to law enforcement: Mulder also claims that Gubler was actually biased because of his prior service as a military police officer, and also because Gubler had family members who are police officers. Aplt. Br. 33-35.

The record does not support this claim with respect to Gubler's own alleged service. In his questionnaire, Gubler specifically stated that he had

not served in the military, and he separately noted that he had never been "in the military police." PCR426-27.

Nor do the alleged family connections establish actual bias. As noted above, a potential juror's own service as a police officer does not automatically disqualify him from jury service. *See Ramos*, 882 P.2d at 152; *Gray*, 851 P.2d at 1223. This principle also applies when the prospective juror has family members who are police officers. *See, e.g., Wach*, 2001 UT 35, ¶41 (rejecting a bias claim that was based on one of the jurors being related to a police officer).

Transcript: Finally, Mulder attempts to overcome the lack of record support for his actual bias claim against Gubler by claiming that his conviction should have been set aside under *State v. Taylor*, 664 P.2d 439 (Utah 1983). Aplt. Br. 33-35. Mulder's argument fails for two reasons.

First, *Taylor* involved a situation like this one in which the transcript from voir dire was incomplete in the appellate record. But that case is inapposite because the claim at issue in *Taylor* was a preserved claim that was raised on direct appeal. Here, however, Mulder's claim arises in the context of a post-conviction challenge to his appellate counsel's performance. Thus, unlike Taylor, Mulder cannot prevail by simply showing that there was some error; rather, Mulder must overcome a strong

presumption that his counsel performed competently. And in the particular context of a failure to move to strike a particular juror, silence alone is not enough. Instead, "a conscious refusal to object to or remove a particular juror may be manifested by nothing more than silence in many circumstances." *Litherland,* 2000 UT 76, ¶20. *Taylor* therefore does not support Mulder's request for reversal based on nothing more than an incomplete transcription.

Second, even on its own terms, *Taylor* does not support Mulder's claim. The conviction in *Taylor* was set aside because of the broad scope of the transcription error—specifically, the voir dire record in that case was so inadequate that the juror's answers were "totally absent from the record." *Taylor,* 664 P.2d at 447. That is not the case here, where the record contains Gubler's questionnaire, portions of Gubler's voir dire, and most significantly, the conclusion of both defense counsel and the court that Gubler was not biased. *See* R261:162 (defense counsel and the court passing Gubler for cause).

Moreover, *Taylor* did not require the conviction to be set aside because of the transcription error alone. Rather, *Taylor* required reversal because the transcription error in question involved prospective jurors whose impartiality was already in question, and because there was a

cognizable claim that the trial court had not permitted further questioning to explore the bias—thereby rebutting the inference that counsel had strategically chosen to pass the jurors for cause. *See Taylor*, 664 P.2d at 445-47. Subsequent Utah decisions have recognized this, refusing to set aside convictions based on an incomplete voir dire transcript if the record also showed that counsel chose to pass the jurors in question. *See State v. Widdison*, 2001 UT 60, ¶¶34-36, 28 P.3d 1278; *State v. Russell*, 917 P.2d 557, 559-60 (Utah App. 1996). Here, Mulder has not shown that Gubler's impartiality was ever in question, nor has he shown that the trial court ever prevented his counsel from asking Gubler any questions to explore the alleged bias. *Taylor* therefore does not require reversal.

2. Mulder also has not demonstrated that his counsel had no plausible reason for wanting to keep Gubler on this jury.

Again, even if defense counsel could have moved to strike Gubler for cause, this does not mean that counsel was required to. Instead, Mulder must show that Gubler "expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror." *Litherland*, 2000 UT 76, ¶25.

Although the transcript of Gubler's voir dire is admittedly incomplete, his questionnaire gives ample reason why counsel could have thought that Gubler would be a good juror. When Gubler was asked

whether it was more important to him "that the innocent be acquitted or that the guilty be convicted," Gubler stated that it was more important to him that the "innocent be acquitted." PCR433. Gubler stated that he understood the presumption of innocence and was comfortable with the idea that he did not need to "hear anything to find [Mulder] not guilty." *Id.* Gubler also expressed a willingness to "completely set aside" any prior opinions about the case and "render [his] decision only based on the evidence presented during the trial." PCR434.

Moreover, in his questionnaire, Gubler also acknowledged that he had visited the jail before, explaining that he did so "in the capacity of a LDS Bishop." PCR430. In this sense, counsel could have readily believed that Gubler's service as a bishop would actually make him a sympathetic juror, given that he had personal experience ministering to parishioners who had been incarcerated.

Because of this, Mulder has not demonstrated that there was no plausible basis for the decision not to challenge Gubler, and the district court therefore correctly denied this claim on this basis as well.

D. Mulder did not carry his burden with respect to Shawna Holt.

Defense counsel passed Shawna Holt for cause and she sat on the jury. R261:162; 262:276. Mulder argues that appellate counsel should have

argued that trial counsel was ineffective for not striking her because she said that she was friends with the wife of Judge James Shumate. Aplt. Br. 36.

First, Mulder has not shown actual bias. Judge Shumate did not preside over this case; Judge Rand Beacham did. Mulder points to no case that holds that a juror cannot sit if she is friends with the spouse of a judge who is not presiding over this case, nor does he explain how this would have created actual bias this case. *See id.* Moreover, Holt was rehabilitated about this potential issue. During voir dire, she was asked whether she had "ever discussed the law in any way with Judge Shumate." She responded: "Never." R262:272.

Second, Mulder points to nothing else in this record demonstrating that Holt was prejudiced against him. He therefore cannot show that her limited connection to the wife of a non-involved judge created a bias that was "so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror." *Litherland,* 2000 UT 76, ¶25.

E. Mulder did not carry his burden with respect to Susan Decorsey.

Finally, Mulder argues that appellate counsel should have argued that trial counsel should have moved to strike Susan Decorsey because "she

tried to secure employment with the police force and has a close friend with the L.A.P.D." Aplt. Br. 36. Mulder cites no record support for his claim that Decorsey did this, nor does he provide legal analysis about why these facts (if true) would make Decorsey biased. This claim is thus inadequately briefed and should be disregarded. *See* Utah R. App. P. 24(a)(9).

In any event, as discussed, Utah precedent allows law enforcement officers or their families to serve on juries. Mulder points to no authority, and the State is aware of none, stating that people who have applied for law enforcement positions or have friends who are in law enforcement cannot serve. Because of this, he has not shown that she was actually biased, let alone that trial counsel could have had no plausible countervailing reason for wanting to keep her on this jury.

VI.

Appellate counsel could reasonably decide not to argue that trial counsel was ineffective for not subpoenaing additional alibi witnesses.

In his petition, Mulder argued that appellate counsel was ineffective for failing to argue that trial counsel should have subpoenaed additional alibi witnesses. *See* PCR112-15. Mulder relied on two letters—one from his mother, Patricia Diepen, and one from her brother, Michael Smith—allegedly written to his appellate counsel detailing their efforts to

corroborate Mulder's claim that he was in Mesquite, rather than St. George, at the time of the Allgood robbery and murder.[6]

The district court ruled that these letters were "insufficient to establish a valid alibi because they do not show that [Mulder] could not have been at the crime scene on the day and at the time of the murder. . . . Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal." PCR568. The district court was correct.

First, appellate counsel could reasonably have chosen to omit this claim because neither letter shows that Mulder's mother or uncle had actually identified a viable alibi witness. In her letter, Diepen said that she spoke with "the people at Uncle Buck's and the Southwest Spirit" about Mulder's alleged whereabouts at the time of the robbery and murder, but she does not identify who any of these people are, let alone demonstrate that they could have been subpoenaed at the time of Mulder's trial. Addendum C. In his letter, Smith was even more vague, stating only that he had spoken with "potential witnesses"—but he provided no names,

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[6] As with the Campbell affidavit discussed above, these were provided as attachments to the post-conviction petition but not included in the appellate record. Mulder has provided them as attachments to his brief, and the State does so as well as Addendum C. *See also* Aplt. Br., Attachments J & K.

contact information, or identifying information for any potential witness. *Id.*

In addition to not identifying the missing witnesses, the letters don't actually establish an alibi. An alibi is a "defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." Black's Law Dictionary, *Alibi* (9th ed. 2009). A "purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." *State v. Romero*, 554 P.2d 216, 219 (Utah 1976).

In this case, Mulder's claim was that he never left Mesquite with Campbell on the morning of the murder, but that he instead stayed behind in Mesquite and tried selling jewelry to local merchants. *See* R255:590-93. The two letters that Mulder relies on provide no admissible proof of this. At most, both contain secondhand accounts of what others may have said, and therefore would have been inadmissible hearsay. Moreover, both lacked specific detail that could have proven Mulder's claim. In her letter, Diepen claimed that she visited two stores in Mesquite, showed pictures of Mulder to "the people at both places," and talked to people who "remembered [Mulder] being there and what they talked about." Addendum C. But Diepen said nothing about locating any proof that

anyone remembered seeing Mulder in their stores on the morning of November 25, 2003, which would be necessary to support an actual alibi. *See id.*

Smith's letter was similarly unhelpful. There, he said that when he and Diepen visited the stores in Mesquite, "[w]hat we found was hopeful but inconclusive due to the lack of physical proof that too much lapsed time brings." Addendum C. Smith said that people remembered seeing Mulder "in their places of business," but he never claimed that anyone specifically remembered seeing Mulder in their business on the morning of November 25, 2003. *Id.*

These letters therefore did not create a viable alibi, because, even if they were true, it was still possible that Mulder visited the stores on some other day or time, rather than on the exact day and time in which Campbell robbed and shot Jordan Allgood. Thus, because it is still "possible for the accused to be the guilty person," these affidavits created "no alibi at all." *Romero*, 554 P.2d at 219.

In short, because Mulder does not point to any testimony from any identified witness that could have proven that he could not have been in St. George at the time of the murder, he has not shown that his appellate counsel overlooked a claim that likely would have resulted in reversal.

VII.

Appellate counsel could reasonably decide not to argue that the trial court should have appointed substitute counsel.

Finally, Mulder argues that appellate counsel was ineffective for not arguing that the trial court should have appointed substitute counsel because Mulder's counsel prevented him from "present[ing] his theory of the case." Aplt. Br. 46. The district court rejected this, ruling that Mulder's "trial counsel did present [Mulder's] theory of the case at the trial, through [Mulder's] own testimony." PCR566. The district court was correct.

"While an indigent defendant has a right to have counsel appointed to represent him, he does not have a constitutional right to a lawyer other than the one appointed, absent good cause." *State v. Pursifell*, 746 P.2d 270, 272 (Utah App. 1987). When "a defendant expresses dissatisfaction with counsel, a trial court must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints." *State v. Lovell*, 1999 UT 40, ¶27, 984 P.2d 382; *see also Pursifell*, 746 P.2d at 272.

Here, Mulder complained about his counsel to the trial court on two occasions. R. 82; R255:520. But despite this, the court never replaced counsel, nor is there any indication that it conducted a *Pursifell* inquiry.

Failure to conduct such an investigation is *per se* error. *See State v. Vessey*, 967 P.2d 960, 962-63 (Utah App. 1998). But a defendant is not

entitled to reversal if the record is "sufficient to support the trial court's determination that good cause did not exist for substitute counsel." *State v. Valencia*, 2001 UT App 159, ¶14, 27 P.3d 573; *accord In re C.C.*, 2002 UT App 149, ¶13, 48 P.3d 244.

This was the case here. Mulder's dissatisfaction with his trial counsel stemmed from their alleged unwillingness to present his preferred theory of the case. *See* Aplt. Br. 45-49. Mulder's theory of the case was detailed in a February 24, 2006, letter that he wrote to his counsel, which he attached to his post-conviction petition. *See* PCR386. In that letter, Mulder alleged: that the coin robbery was Schlegel's idea, not his; that Schelegel tried blackmailing him into robbing the store; that Mulder apparently agreed to rob the store, but then secretly planned to stay in Mesquite and not participate in the robbery; and that Campbell drove to St. George on his own and robbed the store. *See id.*

This is exactly the story that Mulder presented at trial over a year later. Mulder testified, and his counsel elicited this precise account during his direct examination. *See* R255:556-608. Counsel also had an investigator attempt to verify Mulder's claim that he stayed behind in Mesquite, and that investigator testified that he was able to corroborate Mulder's

descriptions of the stores he allegedly visited and the people Mulder allegedly spoke to. *See generally* R255:653-61.

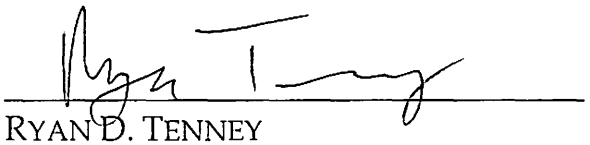
Thus, whatever the extent of Mulder's conflict with counsel, that issue did not end up mattering because Mulder's counsel later facilitated a direct examination in which Mulder told the very story that he now claims he wanted to present. Mulder therefore was not prejudiced by appellate counsel's omission of this claim, and the district court correctly denied it.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on June 8, 2015.

SEAN D. REYES
Utah Attorney General



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CERTIFICATE OF COMPLIANCE

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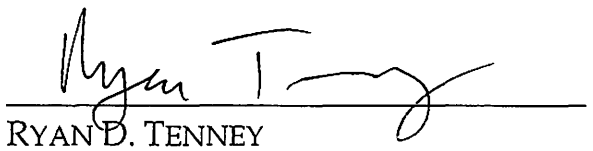

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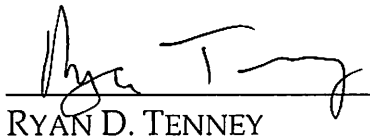
AMENDED CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13,999 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



RYAN D. TENNEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on June 8, 2015, two copies of the Brief of Appellee were

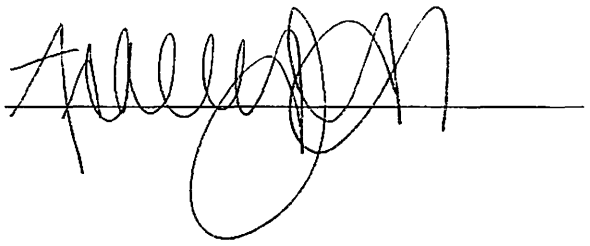
☑ mailed ☐ hand-delivered to:

Todd Mulder
Utah State Prison
Inmate #17817-B
OQ 2-218-B
P.O. Box 250
Draper, UT 84070

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

Utah Code Annotated § 78B-9-104 (West 2009) Grounds for relief — Retroactivity of rule

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;
(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;
(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:
(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
(ii) the material evidence is not merely cumulative of evidence that was known;
(iii) the material evidence is not merely impeachment evidence; and
(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or
(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:
(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or
(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Post-Conviction Determination of Factual Innocence.

Utah Code Annotated § 78B-9-106 (West 2009) Preclusion of relief – Exception
(Formerly cited as UT ST § 78-35a-106)

(1) A person is not eligible for relief under this chapter upon any ground that:
(a) may still be raised on direct appeal or by a post-trial motion;
(b) was raised or addressed at trial or on appeal;
(c) could have been but was not raised at trial or on appeal;
(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
(e) is barred by the limitation period established in Section 78B-9-107.

(2) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time. Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

Addendum B

IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

TODD WAYNE MULDER, Petitioner, vs. STATE OF UTAH, Respondent.	RULINGS ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT Civil No. 100502932 Judge G. Rand Beacham

This matter came before the Court on Respondent's Motion for Summary Judgment as to Petitioner's two remaining grounds for post-conviction relief: Ineffective assistance of appellate counsel (which also incorporates Petitioner's previous claims) and newly discovered evidence.

Respondent's supporting memorandum consists of more than 100 pages of print plus attachments, and Petitioner's opposing memorandum consists of 49 pages of single-spaced handwriting plus attachments. The Court heard oral arguments on the motion and took the matter under advisement.

The Court notes that summary judgment is an awkward context for a case filed under the Post Convictions Remedies Act. Ordinarily, the facts and inferences therefrom which are considered in relation to a summary judgment motion are viewed and construed in the light most favorable to the party opposing summary judgment. In this type of case, however, all factual issues must be resolved "in favor of the jury's verdict and the rulings of the trial court." State v. Yanez, 2002 UT App 50, ¶ 1 n. 1. Accordingly, the Court applies the standard for a case filed under the Post Convictions Remedies Act.

Having fully considered the matter, the Court grants the Motion. The Court is persuaded almost entirely by Respondent's arguments, and will not indulge in much analysis of those issues

which are well-presented in the parties' memoranda. Due to caseload and time restraints, the Court provides only the following summary of the issues and the Court's rulings:

1. Trial counsel's failure to challenge potential jurors on the basis of religious beliefs or preferences was not ineffective assistance of trial counsel.

There are three reasons that Petitioner's claims fail. First, trial strategy is discretionary, and failure to make religion an issue is not per se ineffective assistance of counsel. Second, the Utah Constitution prohibits finding a juror incompetent "on account of religious belief or the absence thereof." Inquiry into religious belief is permissible only where religion is "clearly relevant" to the case. It was not in Petitioner's case. Third, there is no evidence of any unconstitutional exclusion of non-Mormons from the jury. Petitioner relies on speculation, innuendo and falsehoods of which the Court could take judicial notice. Therefore, it was not ineffective assistance for appellate counsel to fail to raise these issues on appeal.

2. Trial counsel's failure to challenge individual jurors for cause was not ineffective assistance of trial counsel.

Challenges for cause must be granted only if a prospective juror is so strongly and unequivocally biased "as to inevitably taint the trial process." The courts presume that failure to object to a juror is a conscious choice by trial counsel and that it is effective representation, unless the Petitioner shows that trial counsel was "so inattentive or indifferent" during jury selection, or that the juror was so biased, or that specific evidence shows counsel's choice was not plausibly justifiable, that the presumption is overcome. Such evidence has not been presented. Petitioner's accusations do not rise above the level of "conspiracy theories," speculation and reckless besmirching of individuals and an entire community.

The record shows that trial counsel actively questioned prospective jurors during voir dire,

and that Petitioner only speculates, without evidence, that trial counsel "purposely" selected a jury of members of the Church of Jesus Christ of Latter-day Saints. There is no evidence before the Court to establish such speculation as fact. Petitioner fails to show that any juror was actually and impermissibly biased. The record shows that voir dire questioning established that there was no such bias.

Therefore, it was not ineffective assistance for appellate counsel to fail to raise these issues on appeal.

3. Trial counsel's failure to argue for 12 peremptory challenges was not ineffective assistance of trial counsel.

This was not a capital case, so Petitioner was not entitled to ten peremptory challenges. Rule 18 of the Utah Rules of Criminal Procedure gave Petitioner the right to four challenges, plus those related to alternate jurors. There is no legal basis for Petitioner's argument that he was entitled to additional peremptory challenges because there were multiple charges. Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal.

4. Petitioner's claim based on newly discovered evidence does not show that no reasonable trier of fact could find him guilty if such evidence, with all other evidence, were presented at a new trial.

Respondent's supporting memorandum made arguments on the assumption that Petitioner was claiming that appellate counsel was ineffective for failing to argue that trial counsel was ineffective because of trial counsel's failure to request a new trial on the basis of newly discovered evidence. In those arguments, Respondent established three reasons that Petitioner could not make such a claim.

Petitioner's opposing memorandum, however, clarified that his newly discovered evidence claim was not related to his ineffective assistance of counsel claim. Accordingly, the arguments are

considered under the standard of Utah Code Ann. § 78B-9-104(1)(e), which has four parts that Petitioner must satisfy.

Petitioner also clarified that he offers the two affidavits of Daniel Campbell's fellow inmates only to show how Petitioner became aware of Daniel Campbell's recantation of his trial testimony. Petitioner does not suggest that these two affidavits are offered for the truth or falsity of Daniel Campbell's statements to the affiants. Accordingly, the two affidavits are relevant only to the timing of Petitioner's discovery of the newly discovered evidence in relation to §104(1)(e)(i), and appear to show that Petitioner has met this requirment. The timing of Petitioner' discovery would not be relevant to trial evidence if Petitioner's case were retried, however, so these two affidavits are not considered in relation to whether Petitioner has met the requirements of §104(1)(e)(ii) through (iv).[1]

Neither party has discussed adequately whether Petitioner has shown that his newly discovered evidence "is not merely cumulative of evidence that was known." For reasons stated below, however, it is not necessary for the Court to rule as to §104(1)(e)(ii).

With respect to whether the newly discovered evidence "is not merely impeachment evidence," the issue is whether Daniel Campbell's recantation and expected new testimony at a new trial would actually constitute impeachment evidence. That might depend on whether the prosecution in a new trial would be allowed to introduce Daniel Campbell's original trial testimony before either party called him for his new testimony. Regardless of when Daniel Campbell would be called to testify at a new trial, whatever he testified there would be subject to impeachment with his contradictory testimony—even if he there recanted his recantation. Neither party has discussed this point adequately, however, and the Court's ruling is not based on §104(1)(e)(iii).

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[1]In addition, Petitioner occasionally offers his own statements regarding his intentions at the time of the crime. E.g., see Petitioner's memorandum pp. 22 and 27. Such statements are not newly discovered evidence and are not considered for any purpose.

Ultimately, Petitioner's newly discovered evidence claims fails because he has not shown that "viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense." Utah Code Ann. §104(1)(e)(iv).[2] The purported new evidence of Daniel Campbell, who already testified against Petitioner at the trial, would be contradictory both to the former trial testimony of Daniel Campbell and Petitioner himself. Furthermore, this new evidence of Daniel Campbell would have little credibility because Daniel Campbell would clearly be admitting that he lied under oath at Petitioner's first trial. Finally, the prosecution would still have the testimony of Lori Schlegel and the physical evidence against Petitioner.

Consequently, when the Court considers the substance of this newly discovered evidence and its probable weight at a new trial, the newly discovered evidence, viewed with all the other evidence, certainly does not demonstrate that no reasonable trier of fact would find Petitioner guilty.

5. Trial counsel's failure to request a jury instruction as to accomplice credibility was not ineffective assistance of trial counsel.

Petitioner is incorrect as a matter of law in his suggestion that his conviction could not be based on the testimonies of his accomplices without corroboration.

Furthermore, the accomplice testimony at Petitioner's trial came from two accomplices, Daniel Campbell and Lori Schlegel, and the testimony of each accomplice corroborated that of the other. In that circumstance, the trial court was not required to give a cautionary instruction and it

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[2]The phrasing of this statute suggests that the Court should imagine that the newly discovered evidence had been given at the first trial, not that the Court should imagine what effect the newly discovered evidence might have in a new trial. This would result in an odd analysis, however, in which Daniel Campbell would have given his former trial testimony and then have given his expected new testimony in the first trial. Rather than participate in such an odd analysis, the Court will phrase this portion of its ruling in terms of the effect the newly discovered evidence might have in a new trial.

was not ineffective assistance for trial counsel not to request such an instruction.

In addition, while Petitioner quibbles about the testimony given by Lori Schlegel and Daniel Campbell, Petitioner has not shown that the testimonies of his accomplices were so self-contradictory, uncertain, or improbable as to require the Court to give a cautionary instruction, or that the Court should have given one, so it was not ineffective assistance for trial counsel not to request such an instruction.

Finally, Petitioner has not shown that an additional jury instruction as to accomplice credibility would likely have resulted in a different verdict, because (a) the trial court did instruct the jury as to the credibility of witnesses generally and (b) the questioning of Petitioner's accomplices by his trial counsel fully identified for the jury the issues as to the credibility, motives, and potential biases of those accomplices.

Therefore, it was not ineffective assistance for appellate counsel to fail to raise these issues on appeal.

6. Trial counsel's failure to request the appointment of substitute counsel was not ineffective assistance of trial counsel.

The reasons given by Petitioner for the appointment of substitute counsel did not and do not constitute good cause for such an appointment. Petitioner's trial counsel did present Petitioner's theory of the case at the trial, through Petitioner's own testimony. Petitioner's trial counsel also presented the only alibi evidence that might have been obtained from the defense investigator. Petitioner's trial counsel further presented the testimony of Joel Daugherty, a fellow inmate of Daniel Campbell, in an effort to impeach Daniel Campbell's testimony. Nothing suggested by Petitioner in this respect shows any likelihood of a different verdict. Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal.

7. Trial counsel's stipulation to certain facts regarding Daniel Campbell's crimes was not ineffective assistance of trial counsel.

The written stipulation presented to the jury was clearly the result of a well-considered, strategic decision by trial counsel, intended to avoid alarming the jury with the violent details of Daniel Campbell's crimes and thereby inflame the jury about Petitioner's case. Nothing in the written stipulation contradicted Petitioner's own trial testimony. Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal.

8. Appellate counsel's failure to argue that trial counsel was ineffective for failing to impeach Daniel Campbell adequately was not ineffective assistance of appellate counsel because such an argument would have been factually incorrect and ultimately futile.

First, the nature and relevant terms of Daniel Campbell's plea agreement, to a first degree felony murder charge, were correctly and sufficiently presented to the jury. Testimony was given by Daniel Campbell, Joel Daugherty, and another expert witness regarding "prison culture" and what the jury might think of the testimony of a prison inmate such as Campbell

Second, trial counsel did question Joel Daugherty at trial about his purported conversation with Daniel Campbell regarding Campbell's purported conversation with an unidentified prosecutor. Petitioner fails to show that anything else could reasonably have been done with this evidence or that it would likely have produced a different result.

Third, evidence of the purported promise of prosecutors to write a letter to the Board of Pardons regarding Daniel Campbell's cooperation with the prosecution of Petitioner does not appear in the appellate record, so it would not have been obvious to appellate counsel.

Finally, Campbell was impeached at length by trial counsel and Petitioner has failed to show a reasonable probability that his verdict would have been different if the purported promise had been

presented to the jury.

Therefore, it was not ineffective assistance for appellate counsel to fail to raise these issues on appeal.

9. Appellate counsel's failure to argue that there was prosecutorial misconduct was not ineffective assistance.

This claim received ample discussion in the parties' memoranda. Simply put, Petitioner's claims of prosecutorial misconduct are not shown to be factually or legally correct. Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal.

10. Trial counsel was not ineffective for failing to subpoena Petitioner's mother, uncle and other unidentified persons as alibi witnesses.

The affidavits of the two proposed alibi witnesses are insufficient to establish a valid alibi, because they do not show that Petitioner could not have been at the crime scene on the day and at the time of the murder. The private investigator, whom Petitioner's trial counsel called as a witness regarding Petitioner's alibi theory, admitted he found no evidence to support a valid alibi. Petitioner's reference to unidentified persons who were not subpoenaed for alibi testimony fails to meet his burden of producing facts to support his claim for relief. Therefore, it was not ineffective assistance for appellate counsel to fail to raise this issue on appeal.

11. Appellate counsel's argument regarding a merger of the aggravated kidnaping charge into the aggravated robbery charge was not ineffective assistance of appellate counsel.

Here Petitioner challenges what appellate counsel did do, rather that what appellate counsel did not do. This claim also fails because, if the merger argument had prevailed, it may have significantly reduced Petitioner's sentence, notwithstanding Petitioner's speculation to the contrary. Therefore, it was not ineffective assistance for appellate counsel to raise this issue on appeal.

CONCLUSION

Accordingly, Respondent's Motion for Summary Judgment is granted and Respondent's counsel may submit an appropriate order and judgment.

Dated this 5th day of October, 2012.

JUDGE G. RAND BEACHAM

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 12 day of Oct, 2012, I provided true and correct copies of the foregoing RULINGS to each of the attorneys/parties named below by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Todd Wayne Mulder
Inmate No. 178178
Utah State Prison
P.O. Box 250
Draper, Utah 84020

Ryan D. Tenney
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

DEPUTY CLERK OF COURT

Addendum C

Attachment — 1

MARGARET PRIM LINDSAY (6766)
P.O. Box 1058
Spanish Fork, Utah 84660
Telephone: (801) 318-3194

TODD WAYNE MULDER, Petitioner, vs. STATE OF UTAH, Respondent.	**AFFIDAVIT OF DANIEL CAMPBELL**

I, DANIEL CAMPBELL, being first duly sworn according to law, on my oath depose and say:

1. I am an inmate of the Utah Department of Corrections, #169017. I am incarcerated for the robbery and death of Jordan Allgood. Todd Mulder was also charged.

2. At Mulder's trial, I testified against him. I lied. Subsequently, I prepared a handwritten, notarized affidavit explaining what had really happened and that I lied about Mulder's involvement. This affidavit was prepared solely at my discretion. Nobody asked me to write it. I did it freely and voluntarily. I have not been threatened or coerced into making these statements. I have not seen Mulder since his trial, or spoken to him since before our arrests.

Attachment C-2

3. Mulder was wrongfully convicted of the charges surrounding the robbery and death of Allgood. He was not present when I entered the store, did the robbery, shot Allgood, and left him handcuffed. While I had some discussion about robbing the Allgood store with Mulder, he did not plan the robbery with me. His involvement was even less than Lori Schlegel's.

4. In addition, he did not drive me to St. George, Utah. I borrowed Schlegel's truck from Mulder and left him at a shopping complex in Mesquite, Nevada, so he could sell some items, AND I DROVE IT TO ST. GEORGE WITHOUT HIS KNOWLEDGE. DC Pgmtt.

5. I understand that I could possibly be prosecuted for perjury. However, what is written in my handwritten affidavit and this one is the truth: I, alone, committed the robbery and kidnapping of Jordan Allgood, and caused his death. I did not mention the shooting of Allgood to Mulder or Schlegel when I returned to Mesquite. Schlegel and Mulder did take possession a portion of the money and coins from the robbery, but that is all.

DATED this 14 day of December, 2010.

Daniel R. Campbell
DANIEL CAMPBELL

SUBSCRIBED AND SWORN TO before me this 14 day of December, 2010.

ROSE MARIE VAN DYKE
NOTARY PUBLIC
STATE OF UTAH
My Commission Expires on:
February 23, 2014
Commission # 581628

Rose Marie Van Dyke
NOTARY PUBLIC

Addendum D

Attachment J

October 31, 2009

Atty: Margaret Lindsay
P.O. Box 1058
Spanish Fork, Utah 84660

Re: Todd W. Mulder #41299
Case #052501050

Dear Margaret,

Enclosed, please find a couple of pictures that I took with me to Utah when I spoke with Modrae at Southwest Spirit and Jarred Noel of Uncle Buck's, the two of the three places that my brother and I went to, to confirm that Todd was in fact with these people. There was one other jewelry store that we went to, but the owner wasn't there at that time. However, the people at both places remembered Todd being there and what they talked about. Like I said on the phone with you the other day, I am sure that Todd's attorney's were getting nervous with me being there, and what I might find out. In my estimation, Todd's attorney's were working for the prosecution instead of Todd.

Also, enclosed is a copy of the letter, written and signed by Derek Clay # 40912 on the 24th of October, 2007, an inmate at Gunnison, stating that Todd in fact had nothing to do with the robbery and murder of Mr. Jordan Allgood in November of 2003.

On behalf of my son, Todd W. Mulder, I have to state with I do not believe that Todd would ever hurt anyone. Yes, he has been in trouble before, as you know, but, I cannot and will not believe that Todd is quilty in this case. I think he was completely railroaded.

I sincerely hope that the enclosed will help you to understand Todd, and believe him, as I do. If there is anything else I can do, just let me know, and I'll do anything and everything I can to help prove his innocence. Thank you so very much for taking the time to talk to me on the phone the other day, it sure made me feel a little better about the situation, knowing that someone like you is in charge.

Sincerely,

Patricia A. Diepen
150 Cortona Way #250
Brentwood, Ca. 94513
Phone: 925-513-4061

Please feel free to call me collect at anytime.

Attachment K

62

March 13, 2009

Trip to see Todd Mulder:

My sister Pat Diepen asked me to drive here to visit her son Todd in Utah. With his location, she is not physically able to see him herself.

As Pat and I drove to Utah she told me the entire story of the events that lead to Todd's incarceration. As the story unfolded, it became obvious the official record on this case is not what happened. Regardless of the out come of this hearing or the lack of evidence at this late date the delay has worked a 100 fold against Todd's innocence in this crime.

I have known Todd since he was a baby and watched him grow up into a young man, which unfortunately he got mixed up with the wrong kids. He's no Angel, but he is also no killer. If you spend 10 minutes with Todd on any subject he is alert, engaged and caring of the topic and discussion. He is intelligent, sincere and any physiologist worth their salt can see he is not capable or better, to intelligent for murder.

After Pat's visit with Todd, I suggested as a whim, more than anything, that we visit the potential witnesses that could prove Todd's innocence. What we found was hopeful but inconclusive due to the lack of physical proof that too much lapsed time brings, remembered conversations, physical evidence (items for sale or viewed), surveillance camera tapes etc. all that will prove he was at these places.

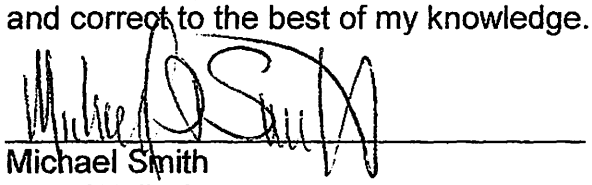
Even after this totally negligent amount of valuable wasted time, individuals still remembered him in their places of business. The only issue that was more amazing to us is that no one recalls any investigation by anyone during the time of the crime! Which, of course, proves Todd's innocence immediately.

I have not met, nor do I wish to meet the original investigators on this case, but the disgrace they represent to the U.S. Criminal Justice System and shear devastation dealt to my Sister and her Son is -CRIMINAL. If I ran my business like they ran this investigation I would be out of business. Unfortunately, in this case, an innocent man sits in prison for something he couldn't have done.

Has anyone looked closely at the individual's who where responsible for this murder and honestly admit the character these people possess warrant's credible judgment against any human being?

Someone, please apply true justice to this case so this man can go home. My sister has very little time left in this world, as her health has taken a major hit from this injustice. Please move fast.

Under penalty of perjury, I swear that the information contained herein is true and correct to the best of my knowledge.



Michael Smith
4210 Wells Ave.
Dunsmuir, Ca. 94206